

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1399

77-1400

To be argued by
ROBERT E. GOLDMAN

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,
against

ANDREW DINKO, a/k/a Kelly,
PATRICIA DINKO, a/k/a Patricia Mushington,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

APPELLANTS' BRIEF

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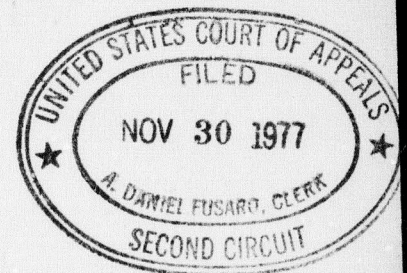


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No. 77 - 1399

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UNITED STATES OF AMERICA,

Appellee,

-against-

ANDREW DINKO, a/k/a KELLY
PATRICIA DINKO, a/k/a PATRICIA MUSHINGTON,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States
District Court for the Eastern District of New York, convicting

each appellant after a trial before the Hon. Mark A. Costantino and a jury, of distributing a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and conspiracy to do so, in violation of Title 21, United States Code, Section 846, and sentencing Andrew Dinko to concurrent terms of five years and a special parole term of five years, the execution of which has been stayed pending appeal, and sentencing Patricia Dinko to concurrent terms of five years, execution of which was suspended, and placing her on probation for five years and a special parole terms of five years, and fining her \$3,000.

ISSUES PRESENTED

1. Were the defendants deprived of their Sixth Amendment right to the effective assistance of counsel by virtue of the fact that they were jointly represented by one attorney?
2. Were the improper remarks of the Assistant United States Attorney during final argument fatally prejudicial to the defendants?

STATEMENT OF THE CASE

Pretrial Proceedings

On June 7, 1976, an indictment was handed up by a Grand

Jury impanelled in the Eastern District of New York, charging Andrew and Patricia Dinko, and two others, with one count of distributing a controlled substance, under 21 U.S.C. § 841(a)(1), and one count of conspiracy to violate that section under 21 U.S.C. § 846. No pre-trial motions were filed. The trial of the Dinkos commenced on June 13, 1977, both defendants being represented by the same attorney.

Evidence at Trial

The Government's proof consisted principally of the testimony of Charles "Piggy" Johnson and former undercover Drug Enforcement Agency (hereafter, "D.E.A.") Agent Henry Segar. Two New York City police officers, one who acted in a surveillance capacity and the other who posed as Segar's wife on several occasions, also testified.

Johnson testified that he had previously been convicted of crimes on three occasions, two of them for selling heroin to undercover law enforcement officers (T38-41).^{*} In February, 1976, he was sentenced in State Court to 15 years to life as a result of having been convicted after trial on one of those sale cases. (T39) Less than two months later he decided to cooperate with

^{*}References in parentheses beginning with a "T", e.g., (T___), are to pages in the trial transcript. References in parentheses beginning with an "A", e.g., (A___), are to pages reproduced in Appellants' Appendix.

governmental authorities in exchange for a promise that his incarceration would be in a Federal rather than State facility and further that a representative of the Government would write to the Governor of New York advising of the cooperation rendered and recommending a pardon which would result in a reduction in the time to be served (T42-43, 110-124). Thus, instead of waiting until 1991 to first become eligible for parole, Johnson, because of his testimony, expected to be eligible for release shortly (T117).

Johnson testified that in 1971, before he knew either of the defendants, he was working as a cook or assistant cook at Creedmore State Hospital, and was selling heroin on the side (T47). He said he came to know the other defendants when he and two associates, Leroy "Coco" Files, a fellow worker at Creedmore and also a fellow heroin salesman (T46), and George Royster, who was employed as a gambler and a thief (T45), decided to buy a candy store and needed extra money (T49-50). In an effort to get better quality heroin to sell so as to raise the money to buy the candy store, Royster took Files and Johnson to what turned out to be the defendants' home, where Royster apparently obtained a quantity of heroin on behalf of the enterprising trio (T50-56). Neither Royster nor Files testified.

Johnson stated that he bought drugs from the defendants at their home off and on for the following two years (T69, T74-75, T77-78). During the latter part of that time, he legitimately worked for them in connection with Mr. Dinko's campaign for the presidency of the National Maritime Union (T79-80). From the beginning of 1973, and throughout the remainder of the time period he testified about, he was an addict himself, mainlining heroin (T183-185).

On April 13, 1973, Johnson was told by an acquaintance, Joe Boyd, that Boyd had some friends from Washington who wanted to buy some heroin. The friends were undercover Agent Segar and undercover New York City police officer Dorothy Richardson,* who Johnson subsequently met (T83). Johnson spoke to Mr. Dinko about the matter, and was told to send Boyd to speak to him also. A short time later, Johnson was with Boyd when Mrs. Dinko gave the latter a package, which was then taken to Agent Segar (T86-88). Johnson subsequently delivered the payment from Segar to Mr. Dinko (T89). Boyd did not testify at the trial either.

About two weeks later, Johnson met with Boyd and the undercover agents again, who wanted to make another purchase (T91). Johnson said he tried to arrange it with the Dinkos, but was

* Officer Richardson had married between the incident and the trial, and was referred to at trial as Dorothy Johnson.

unable to (T92-93).

By the summer of 1973, Johnson moved into the house next door to the Dinkos, which was also owned by the Dinkos, and where he lived for about four months (T95, 132).

Some six months after the last transaction he testified about, Johnson met Segar again, who wanted to purchase more heroin (T95-96). Johnson stated that he got him a sample from the Dinkos (T97) and got 1/8 of a kilo from them the following day, which he delivered to Segar and "his wife" (T100-102).

On November 14, 1973, Segar again told Johnson he wanted to purchase heroin, and that he wanted to meet Johnson's supplier (T104). According to Johnson, Mrs. Dinko, by herself, went with him to his apartment to "see what [Segar] looked like" (T106-107, 190).

Henry Segar testified that he had been an agent with the D.E.A. at the time of the events in question, but had since been dismissed for giving false information to D.E.A. inspectors, failure to advise his superiors of a material fact in connection with an official investigation, and omission of a material fact in connection with testimony given before a grand jury (T290-291, 204). The situation that led to those charges and the dismissal involved an incident in which Segar, operating in an undercover

capacity, was given \$5,300 to make a narcotics buy, which he said he did, but which was in dispute. Apparently, Segar initially identified a certain individual as the one who sold him heroin, but subsequently stated that he could not identify that defendant, and furthermore, that he never had. Five police officers and agents, at least one of whom was a division chief, testified contrary to Segar (T204, 290-298, 344). In addition, Segar stated that while still on the force, he had been suspended for two weeks for previous, unrelated misconduct (T204-205, 287-290).

Segar testified that he first met Boyd on April 6, 1973, in an effort to buy drugs. Boyd said he would have to get the drugs from "his people," and the two men drove to the vicinity of the defendants' house, parking some distance away. After Boyd walked down the street and returned to the car with the information that no one was home, he wrote out a note saying he'd return in a few minutes. No contact was made that day, however (T208-212).

A week later, this time with Officer Richardson posing as his wife, Segar met Boyd again. They repeated their drive to the vicinity of the defendants' house, and after Boyd found no one home, left a note (T214-215). Boyd then took them to where Charles Johnson lived, and he, Johnson, joined them in the car. After driving around for a time, they went back to near the

Dinkos' house, where Boyd and Johnson left the car and the agent's view. Upon returning to the car some time later, Boyd and Johnson delivered a sample of heroin to Segar (T219-227). Later that same night, after Segar again drove to the vicinity of the defendants' house, Boyd and Johnson again left the agents' car and were out of their view for some time. When they returned, they sold Segar one ounce of heroin for \$1,200 (T230-232).

On April 26, 1973, Segar and Richardson again met Boyd (T238). The three of them went to the defendants' residence, but again no one was home (T239). While there, however, Boyd remarked that "his man" was running for president of the National Maritime Union (T240). Later that day, Files also bragged that the people behind him were running for office (T242). No business was transacted that day.

Segar's next involvement with this investigation was on September 20, 1973, when he again negotiated for a purchase of heroin, and received another sample from Johnson (T247). The next day Johnson delivered \$4,500 worth of heroin to Segar and Richardson, going through the same procedure of parking in the vicinity of the defendants' house (and, at this time, of Johnson's house next door also), leaving the car and returning with a package a short time later (T252-253).

On November 14, 1973, Segar met with Johnson to discuss a further purchase and a meeting with Johnson's "people" (T255-256). While Segar was in Johnson's girlfriend's apartment, a woman whom he identified as Patricia Dinko walked in with a little boy (T308,257). After she left and Segar repeated that he wanted to meet Johnson's "people", Johnson replied, "You will" (T257-258).

On November 27, 1973, Segar called Boyd about meeting his "people", and was given a telephone number which Boyd said was at his people's house (T261-262). That evening Segar and Boyd went to the Long Island Railroad station on Archer Avenue, where Patricia Dinko subsequently met them (T269-272). Segar testified that he and Mrs. Dinko negotiated for a sale of heroin, but the deal never went through (T272-274).

New York City Police Department Detective Dorothy Johnson testified that during the events in question, her name was Dorothy Richardson (T354). She said that she was with Segar on three occasions relative to this investigation: April 13, April 26, and September 21, 1973. She basically confirmed Segar's version of what happened with Boyd, Johnson, and Files on those dates, adding the observation that when Johnson returned from the direction of where his house and the

defendants' house was, with a package of heroin on September 21st, he had different clothes on than when he had left the car (T369). She never saw either of the defendants while working in her undercover capacity (T376).

Finally, New York City Police Officer John Dworsak testified for the Government, chiefly as to his surveillance activities on several dates. He said he saw Segar meet Boyd on April 6, 1973, and saw Boyd go to the defendants' house, but receive no answer (T379). On April 13th, he saw Boyd leave a note at the defendants' house, and return later to find that the note had not been picked up yet (T383-384). Later that evening he saw Johnson and Boyd enter the defendants' house twice, and upon leaving each time, walk in the direction of Segar's car (T387-388). On September 20th, Dworsak saw Segar with Johnson on several occasions, but did not see where Johnson went upon leaving Segar's company (T392-393). On September 21st, he saw Andrew Dinko in front of his house (T395), later saw Patricia Dinko walk around the block (T398), and a short time after that saw Johnson leaving the Dinko house (T398). On November 14th, he was surveilling Johnson's girlfriend's building, where Segar said Mrs. Dinko walked in, but did not see Mrs. Dinko enter at any time (T415-416). Finally, on November 27th, Dworsak observed Patricia Dinko with Boyd and Segar at the Long Island Railroad station, and

said he also observed Andrew Dinko walking a dog about a block or so away (T401-403). Dworsak testified that the telephone number he had been given by Segar was subscribed to at the defendants' residence under Mrs. Dinko's name before her marriage (T404-405).

The defense case consisted primarily of the testimony of one of the defendants, Patricia Dinko. Andrew Dinko did not testify.

Mrs. Dinko denied any complicity in or knowledge of any conspiracy or scheme to possess or distribute heroin.

Mrs. Dinko said she had been married to Andrew Dinko for ten years, and worked as his campaign manager when he ran for president of the National Maritime Union in 1973 (A34). She met Johnson in 1969 when he was going out with a tenant of hers, at which time she and her husband learned that Johnson worked at Creedmore (A35-37). Mr. Dinko's father was confined there, and Johnson would occasionally look in on him (A37). Mrs. Dinko met Files through Johnson (A39).

In 1972, after helping Johnson furnish an apartment with his new girlfriend, and after Johnson moved close by, the Dinkos saw him more frequently (A41-42). When Mr. Dinko decided to run for the union presidency, Johnson started to work in the

campaign (A44). At one point, Johnson had the keys to each of the Dinkos' houses, obtaining the key to their personal residence in March of 1973, and obtaining a key to the house next door in July of that year (A85).

In separate incidents during his candidacy, Mr. Dinko was attacked and shot (A44-45). In addition, the Dinkos sued in Federal Court claiming irregularities in the election (A46). As such, there was significant contact with the media, including radio station WWRL (A44-45). At one point, after Mr. Dinko met with reporters from WPIX-TV, he, Mrs. Dinko, and several newsmen went outside to do an interview and found New York City police officers rummaging through the camper which served as mobile campaign headquarters (A47-48).

Mrs. Dinko stated that she was not at home on April 13, 1973 (the day Johnson supposedly got heroin from her for Segar for the first time) until after midnight, having been in the union hall and then in Harlem (A51). She also said that she was at the Department of Labor, at 26 Federal Plaza, on November 14, 1973, the date that Segar supposedly first saw her in Johnson's girlfriend's apartment (A87).

The first that Mrs. Dinko learned of any drug transactions was on November 15, 1973, when Johnson's common law brother-in-law, Nick Burgess alerted her. He said Johnson

and Files were going to rip off a buyer who wanted to get \$40,000 worth of drugs from them that he thought originated with the Dinkos. Since Johnson and Files knew that they could not get drugs from the Dinkos to fill the order, they planned to steal the money (A53-54).

The Dinkos, fearful that some of their campaign workers were using their names in a manner that could hurt them, went with Burgess the next day and contacted reporters from radio station WWRL, which had been particularly active in covering the union campaign (A55). They explained what they had learned from Burgess to three reporters, Dick London, Les Campbell, and George Flowers, and told them they believed the incident to be union inspired (A70-71). It was decided that Mrs. Dinko would set up a definite meeting with the prospective buyer, and would give the reporters two hours' notice so that they could be wired and could record the conversation (A71).

Within a day or so, Mrs. Dinko, separately, confronted Johnson and Files with what she had heard, and they each confirmed that it was true (A74-75). At about that same time, the Dinkos discovered that Johnson, then a tenant of theirs, was shooting heroin, and told him to move out (A75-76). Mrs. Dinko also confronted Boyd with the story, and he told her that he had known the buyer from when they served together

in the army and that the man first came to him and he directed him to Files and Johnson (A77-78). At this time, Boyd also explained that it was Files' idea to claim that the Dinkos were their "people" so that prospective buyers would be impressed (A142). Mrs. Dinko told Boyd that she wanted to meet with the buyer the next time he contacted him (A79-80).

In the evening of November 27, 1973, Boyd called and told Mrs. Dinko that the buyer was with him (A80). In order to set up a definite appointment later, Mrs. Dinko said she would meet them at the Long Island Railroad station in fifteen minutes (A80). Mr. and Mrs. Dinko were dropped off there by a tenant, but Mr. Dinko walked away and was not a part of any conversation. Mrs. Dinko was introduced by Boyd to Segar, who gave his name as Henry Whare, and talked to him for about forty-five minutes (A82). She spoke in general terms about a sale (A82-83), leading him on so that she could set up a definite appointment when the reporters could be present (A149), and so that she could find out if he were connected with the union (A151). She told him that he should be wary of Files and Johnson (A83-84, 150-151), talked about the union and the campaign (A151), and asked for and received what he claimed were his residence and business addresses (A150, 83) and his license plate number (A83). When Mrs. Dinko asked

Segar to make a definite appointment to continue the discussion, Segar said he would get back in touch with her within two days (A84).

Mrs. Dinko called reporter Dick London at radio station WWRL the first thing on the following morning, November 28, 1973 (A84,151), since Mr. London was not there the night before when the meeting took place (A80). Arrangements were made to have the reporters wired and ready to go to the meeting of Mrs. Dinko and Segar, but Segar never called back as he had said he would (A84).

On cross-examination, Mrs. Dinko stated that she had brought \$20,000 with her to this country in 1971, and that this was the source of bank deposits in the latter part of that year which the prosecutor inquired about (A175-186).

Three reporters from radio station WWRL, Richard Hanna (whose radio name is Dick London) (T591), George Flowers, and Les Campbell testified, and basically confirmed Mrs. Dinko's version of their participation in the events described.

Hanna stated that the Dinkos and one of their campaign workers came to the radio station on November 16, 1973, and told him that some other campaign workers were approached by a man and woman who offered to buy narcotics from the Dinkos

through the workers (T592-593, 596). The station had been covering the campaign for some time, specifically as it related to the way the National Maritime Union functioned when a minority member bucked the establishment to run for high office (T618,633), and Hanna had previously contacted different law enforcement authorities, and United States Senator John McClellan of the Senate Crime Committee, in an effort to help the Dinkos (T594-595).

When they reported the narcotics overture on November 16th, the Dinkos asked for assistance and guidance in handling the situation (T593). Hanna then called the F.B.I., which said it was a local matter, so he called local authorities who referred the matter to a narcotics division, but all with no results (T594). Since Hanna had previously been told by Senator McClellan that his Committee could lend assistance if the Dinkos' allegations were substantiated by independent witnesses (T594-595), the reporters devised the plan to have a meeting set up with the prospective buyer that could be taped (T595). Hanna decided that Mrs. Dinko should be the one to make the contact, since Mr. Dinko was more of a public figure (T595-596). Flowers and Campbell were to be ready on two hours' notice to be disguised and secretly wired (T597-598).

On November 27th or 28th, Mrs. Dinko called Hanna and told him that she had been contacted (T602, 624). He alerted the other reporters to stand by (T624), but the meeting, and therefore the taping, never eventuated.

Flowers and Campbell testified to the same effect as did Hanna. Flowers added his impression that when the Dinkos went to the radio station on November 16, 1973, they suspected that they were being set up by union officials or others (T638).

ARGUMENT

POINT I

THE DEFENDANTS WERE DEPRIVED OF THEIR RIGHT
TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY
VIRTUE OF THEIR JOINT REPRESENTATION BY ONE
ATTORNEY

The Sixth Amendment right to the assistance of counsel guaranteed all defendants facing felony charges, Gideon v. Wainwright, 372 U.S. 335, 9L.Ed.2d 799 (1963), has long been recognized to mean the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n.14, 25 L.Ed.2d 763 (1970). One manner in which that right may be violated is the simultaneous representation of conflicting interests by a single lawyer. Glasser v. United States, 315 U.S. 60, 70, 86 L.Ed. 680, 699 (1942). Appellants claim that is precisely what occurred in this case, and that it mandates reversal of the judgment of conviction.

Throughout their trial and sentencing both defendants were represented by the same, retained attorney. The record is barren of any recognition that in such a situation a conflict might exist or evolve; there was apparently no inquiry by the court below and no concern expressed by the Government. There is no indication that the defendants,

laypersons in the legal sense, were aware or advised of the potential problems inherent in the joint representation, and there is certainly nothing reflecting a knowing and intelligent waiver -- or, for that matter, any waiver at all -- of the right to the unimpaired assistance of counsel.

A. It Was Error Not To Inquire Into And Hold A Hearing On The Conflict Issue

The above circumstances indicate a disregard of this Court's repeated instructions as to the proper course of action when a potential conflict of interest arises. In United States v. Lovano, 420 F.2d 769, 772 (2d Cir.), cert. denied, 397 U.S. 1071, 25 L.Ed.2d 694 (1970) the very fact that two or more co-defendants were represented by the same counsel was deemed a sufficient basis to alert a trial judge and cause him to inquire whether the defenses to be presented in any way conflict. In United States v. Alberti, 470 F.2d 878, 881-82 (2d Cir. 1972), cert. denied, 411 U.S. 919, 36 L.Ed.2d 311 (1973), a case in which the defendant's attorney had previously represented a government witness, this Court advised that upon awareness of a potential conflict of interest:

"[T]he district judge should conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that

the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views."

The following year the applicability of that same procedure where defendants have "similar interests and [are] joined together as coparticipants in the crime" was confirmed. United States v. DeBerry, 487 F.2d 448, 452 (2d Cir. 1973). In United States v. Carrigan, 543 F.2d 1053, 1055 (2d Cir. 1976), the "clear law" in this Circuit was reiterated:

"When a potential conflict of interest arises, either where a court has assigned the same counsel to represent several defendants or where the same counsel has been retained by co-defendants in a criminal case, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views."

Most recently, in Abraham v. United States, 549 F.2d 236, 239 (2d Cir. 1977) those "requirements" were repeated once again. Clearly, however, they were not met in the instant case.

B. The Government Must Show That The Defendants
Were Not Prejudiced By The Joint Representation
Of Them By One Attorney

This Circuit, unlike some others*, requires "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation" before a denial of effective assistance of counsel will be found. United States v. Carrigan, supra; Abraham v. United States, supra. The failure to adequately inquire and hold what has come to be known as a DeBerry hearing on the potential conflict issue becomes significant in this regard, because it shifts the burden of proof on the question of prejudice from the defendant to the Government. United States v. DeBerry, supra, 487 F.2d at 453-54 n.6; United States v. Carrigan, supra, 543 F.2d at 1056; United States v. Foster, 469 F.2d 1 (1st Cir. 1972).

1. The Government Must Show Lack of Prejudice
Beyond A Reasonable Doubt

The question of what standard should be applied in determining whether the Government meets that burden has not yet

*See, e.g., United States ex rel. Hart v. Davenport, 478 F.2d 203, 210 (3d Cir. 1973); Goodson v. Peyton, 351 F.2d 905, 909 (4th Cir. 1965); Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974), c.f. Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967).

been addressed in this Circuit, and has apparently been reached in only a few other jurisdictions. In United States v. Foster, supra, 469 F.2d at 5 (the case specifically followed when this Circuit, in United States v. DeBerry, supra, adopted the shifting burden rule), the First Circuit established that standard, on direct appeal, to be that the Government "demonstrate from the record that prejudice to the defendant was improbable", and in the context of a \$2255 motion, that the Government establish the unlikelihood of prejudice by a preponderance of the evidence. The District of Columbia Circuit, on the other hand, measures the Government's burden by a beyond a reasonable doubt standard, Lollar v. United States, 376 F.2d 243, 247 (1967); Ford v. United States, supra, 379 F.2d at 125, relying on the Supreme Court's pronouncement in Chapman v. California, 386 U.S. 18, 18 L.Ed.2d 241 (1967) that such a standard should govern whenever the prosecution contends the denial of a constitutional right is merely harmless error. The Supreme Court of Minnesota has very recently adopted that same beyond a reasonable doubt standard when satisfactory inquiry does not appear on the record and the burden shifts to the state to demonstrate the lack of a prejudicial conflict of interests. State v. Olsen, ____ Minn. ____, 22 Cr.L.Rep. 2114 (October 7, 1977).

It is submitted that the Government should be required to show more than an improbability of prejudice once it assumes its burden, and that the reasonable doubt standard should be applied in this Circuit. In addition to the reasoning of the courts that have already adopted such a rule, the Supreme Court has counseled that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, supra, 315 U.S. at 76, 86 L.Ed. at 702. Determining whether there was a showing of a mere probability that there was no prejudice would be to indulge in just such nice calculations. Rather, the inviolability of that fundamental and absolute right should be established beyond a reasonable doubt.

C. The Government Cannot Show That The Defendants Were Not Prejudiced By The Joint Representation Of Them By One Attorney

Regardless of which standard is applied, it is submitted that the prejudice flowing from the joint representation is so manifest in the record that the Government cannot meet its burden. In fact, even had that burden not shifted, the defendants would easily have been able to show the specific instances of prejudice required.

Before considering those specific instances as to each defendant, some general observations within which those specifics will be better viewed should be made. It makes no difference that the defendants were husband and wife; that circumstance does not alleviate the infirmity of representation by one attorney with divided loyalty, even where -- contrary to the situation here -- the record reflects that the strategy underlying that division was supported by the parties. Mone v. Robinson, 430 F.Supp. 481 (D.Conn. 1977). Neither does it matter that the record reflects an apparently unified defense. "The presentation of a consistent defense, far from precluding the possibility of prejudice, may even be evidence that the lack of independent counsel hindered development of the distinguishable positions of the separate defendants at trial." United States v. DeYoung, 523 F.2d 807, 809 (3d Cir. 1975); c.f. Sanchez v. Nelson, 446 F.2d 849, 850 (9th Cir. 1971). Nor does the fact that the defendants were alleged to be part of a conspiracy minimize what might otherwise be considered a prejudicial conflict. In fact, the opposite is probably true, as reflected by the Supreme Court's observation that:

"In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly

against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel..." Glasser v. United States, supra, 315 U.S. at 76, 86 L.Ed. (t 702.

1. Prejudice As To Andrew Dinko

The most serious instance of prejudice arises from the fact that only one of the two defendants, Patricia Dinko, was called to testify. The problems encountered in such a situation were explained by Chief Judge Lumbard in the course of emphasizing the extreme care to be taken in assigning or allowing single counsel in multi-defendant cases:

"Despite what the appearances may be before trial, the possibility of a conflict of interest between two defendants is almost always present to some degree even if it be only in such a minor matter as the manner in which their defense is presented. This is so especially where there is a question as to whether either or both of the defendants should take the stand. This kind of decision, difficult enough where two defendants at the same trial are represented by different counsel, is made doubly difficult where they are represented by the same counsel. The decision whether a defendant should testify may be unduly affected by the risk that his testimony may develop so as to disclose matters which are harmful to the other defendant or which conflict with the other defendant's story. The attorney's freedom to cross-examine one defendant on behalf of another will be restricted where the attorney represents both defendants. And if, where two defendants are represented by the same attorney, one defendant

elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost inescapable." Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968) (emphasis supplied); c.f. United States v. Carrigan, supra, 543 F.2d at 1056.

This "almost inescapable prejudice" has not only been found where the testifying defendant incriminates the silent one, United States v. DeBerry, supra, but also where the testifier attempts to minimize the participation of both. United States v. Carrigan, supra.

In the case at bar, the "almost inescapability" becomes absolute when certain conduct of the defense attorney is considered.

Counsel's opening statement began with the following remarks:

"Judge Costantino, co-counsel, Mr. Appleby, Mr. Foreman, ladies and gentlemen of the jury, the defense in this case, while it has no responsibility to do so, will come out of the normal role that a defense could have under the law and hide behind or make use of certain rights. We don't want to make use of those rights. We will come forward and we will tell you what happened from our point of view. We will tell you what our understanding of what happened was. We will tell you why we believe the other people are testifying as they are and we will tell you why we believe this prosecution was brought in behalf of the United States government against

these two people here.

Now, you will hear from the defense in this case that there are two people that are on trial, they happen to be a husband and wife. Neither of them have -- has any prior confrontation with the law. Neither of them has been convicted of a crime. We will respond to whatever it is the Government could prove that we did and we will go even further, somethings that the Government can't prove we'll tell you exactly what happened from the mouth of the defendants." (A 13)

Thus the jury heard, in its first direct contact from the defense, comment on the failure of a defendant to testify in language that would clearly have mandated reversal had it come from the court or the prosecution, 18 U.S.C. §3481; Griffin v. California, 380 U.S. 609, 612, 14 L.Ed.2d 106, 108 (1965), and, more importantly, had it come from counsel for a co-defendant. United States v. Caci, 401 F.2d 664, 672 (2d Cir. 1968), cert. denied as to defendants Caci and Cino, 394 U.S. 917, 22 L.Ed.2d 450, rev'd on other grounds as to defendants Natarelli and Randacci, 394 U.S. 310, 22 L.Ed.2d 297 (1969). The jury members were told from the beginning that it is normal for defendants "to hide behind or make use of certain rights", but that that would not happen in this case. They were then promised they would be told "exactly what happened from the mouth of the defendants." The conclusion, when they did not, in fact, hear from the mouth of one defendant, that it was

because he ultimately hid behind certain rights, is too natural to disregard.

Counsel's further statement in this regard, toward the end of his opening*, does little or nothing to remove the impression the jury had been given, but rather, if anything, exacerbated it. Not only was the probability that both defendants would testify reemphasized, but it was done this time in the context of assuring the jury of the defense's desire to present "the full picture." Less damaging remarks in opening statements by single counsel representing multiple defendants have contributed to findings of prejudicial conflict. Holland v. Henderson, 317 F.Supp. 483, 441 (E.D.La. 1970), aff'd., 460 F.2d 978 (5th Cir. 1972) (Counsel said defense of all three defendants was alibi, yet made no effort to establish alibi for petitioner).

In summation, counsel said nothing to explain his unfulfilled assurances as to both defendants testifying. In addition, that closing statement affirmatively exhibits other

*"You'll hear from the defense. I don't know and it will be my choice whether one, both of them will testify, but you'll hear from the defense. Those people, probably both, maybe one will be enough. I don't know. To give you a full picture of what happened and also to give the Government a full picture because they should know too. A full picture of what happened."
(A 21-22)

conflicting interests that independent counsel could have obviated.

Counsel states ad to do nothing. We didn't have to produce one witness, but we did it. And we did it as best we could..." (A 243). A natural question that arises is why the best the defense could produce excluded the testimony of one of the defendants, and a natural answer that it is because that defendant was in some way culpable.

Further along in the summation counsel, in refering to some of the testimony Patricia Dinko gave, says:

"She tells you that she -- she can account for her time on April 13 with a ticket in the union hall. Does anybody come in here and say its not true? She tells you on November 14 when she's suppose to be with someone else, she's in the Labor Department -- U.S. Labor Department."
(A 246-247)

From this reference a clear implication that Andrew Dinko could not do as his wife did, and tell the jury where he was on those dates, can be drawn.

Finally, the summation is barren of any attempt to take advantage of areas in which the evidence was weaker against one defendant than the other. No witness, for example, except

the convicted felon - leniency aspiring - accomplice Johnson, directly involved Andrew Dinko in any narcotics activity. This factor was never even raised, no less developed by counsel.

A third area in which the conflict of the joint representation manifested itself was in the testimony of Patricia Dinko. At the outset, the two defendants being husband and wife during the entirety of the alleged conspiracy and during trial (A 34), the possibility that Andrew Dinko might have wanted and been able to object to much of his wife's testimony on the basis that it was privileged, should have been explored.

The marital communications privilege is two pronged, consisting of an adverse testimony privilege, which forbids testimony of one spouse that is adverse to the other spouse, regardless of the source of knowledge, United States v. Fisher, 578 F.2d 836, 839 (2d Cir.), cert. denied 423 U.S. 1033, 46 L.Ed.2d 407 (1975); United States v. Harper, 450 F.2d 1032, 1045 (5th Cir. 1971); 8 J. Wigmore, Evidence §2334(2) (McNaughton rev. ed. 1961); and a communications privilege, which protects such information obtained through confidential communications. United States v. Harper, supra; United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975). Had independent counsel evaluated

the case for Mr. Dinko, he may well have reached the conclusion that the very fact that Mrs. Dinko was to testify to the version that she did was adverse to his client's interests, as was much of the content of what she said.* An articulable argument for a severance on that ground could have been made, and the issue should at least have been brought to Mr. Dinko's attention and considered.

In addition, on several occasions while Mrs. Dinko was testifying, objections very probably could, and should have been made on her husband's behalf on the second, or confidential communications ground. Questions posed to Mrs. Dinko concerning Mr. Dinko's employment and sources of income during specified years (A 172-174,181), and concerning his income tax returns (A 188), might only have been answered on the basis of confidential information. No objection was made on this ground by counsel.

Finally, apart from any considerations of privilege, it appears that Mr. Dinko's interests were inadequately protected

*In retrospect it is apparent that the jury did not, in fact, credit Mrs. Dinko's testimony, and in that respect it was certainly adverse to Mr. Dinko.

during his wife's testimony. At one point during cross examination, for example, the following colloquy occurred:

"Q: Can you give us your best estimate as to what Mr. Dinko made for '67, '68 and '69 as a seaman?

"A: I can't give you that. You'll have to ask him that yourself." (A 173-174).

That there was neither an objection nor a request for an immediate curative instruction from the court is somewhat understandable in view of the fact that counsel, in raising the issue in the jury's presence on behalf of one of his clients, would necessarily be inferring that his other client overstepped the proper bounds in her answer. Even more significant than this one example, however, is the fact that though she was examined by the Government, Mrs. Dinko was never really cross examined by anyone who was concerned solely with her husband's best interests. As this Court said in Morgan v. United States, supra, 396 F.2d at 114, "[t]he attorney's freedom to cross examine one defendant on behalf of another will be restricted where the attorney represents both defendants."

2. Prejudice As To Patricia Dinko

While the prejudice to Patricia Dinko caused by being re-

presented by the same attorney as her husband may be less apparent than his, it is, nevertheless, real.

In the two most recent cases in which this Court reversed convictions because of a conflict in a multi-defendant situations, prejudice was found as to the defendant who took the stand and testified, as well as to the silent, and probably more slighted co-defendant. United States v. DeBerry, supra; United States v. Carrigan, supra. In both cases it was felt that even the defendant who seemed to benefit was not afforded the zealous and independent counsel to whom he was entitled. One reason was that counsel could not fully exploit the testifying defendant's willingness to testify without damaging the silent defendant's credibility. United States v. Carrigan, supra, 543 F.2d at 1057. Another reason was the possibility that independent counsel would have advised the silent defendant to testify and thus afforded the second defendant an opportunity to cross examine the first. United States v. DeBerry, supra, 487 F.2d at 448. Both of those reasons are applicable to the case at bar.

In addition, as often happens, Mrs. Dinko was quite probably placed in the position of having the defense case judged as an entity, and thus having the negative inferences and

associations that inevitably attached to her non-testifying co-defendant transferred to her. While this may have happened even had there been separate counsel, the situation was exacerbated by the appearance of a single lawyer speaking for both people, and the unity of purpose that that circumstance naturally projects. The fact that a husband and wife were involved only magnifies that apparent unity and the easy transference of attributed impressions. To paraphrase this Court, "[w]hile there is perhaps less reason for saying that [Patricia Dinko] was prejudiced by the joint representation, it is in the best interests of justice, we think, to reverse and remand for a new trial as to both parties..." United States v. DeBerry, supra, 487 F.2d at 454.

POINT II

THE HIGHLY IMPROPER REMARKS OF THE ASSISTANT UNITED STATES ATTORNEY DURING FINAL ARGUMENT WERE FATALLY PREJUDICIAL TO THE DEFENDANTS

In the context of a close case in which credibility was a central issue, the Assistant United States Attorney during summation, repeatedly resorted to assertions of personal knowledge, personally vouching for the credibility of key government witnesses, as well as improper suggestions and insinuations. These improper comments were cumulatively so prejudicial as to require reversal of the convictions of these defendants.

A. The Bounds of Propriety in Final Argument

By this late date, there can be no room for doubt that an attorney may not personally vouch for the credibility of his witnesses or the strength of his case. "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause." Disciplinary Rule 7-106(c)(4) of the Code of Professional Responsibility, formerly Rule 15 of the Canons of Professional Ethics of the American Bar Association. See United States v. Drummond, 481 F.2d 62 (2d Cir. 1973); Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960). Similarly, there can be no justification for "improper suggestions, insinuations, and especially, assertions of personal knowledge" in the Assistant United

States Attorney's final argument:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88, 79 L.Ed. 1314, 1321 (1935).

In recent cases, this Court has repeatedly admonished federal prosecutors that "inflammatory or insinuating questions or statements" may require reversal, United States v. Burse, 531 F.2d 1151, 1154 (2d Cir. 1976); United States v. Bivona, 487 F.2d 443 (2d Cir. 1973); United States v. White, 486 F.2d 204 (2d Cir. 1973) cert. denied, 415 U.S. 980, 39 L.Ed.2d 876 (1974); United States v. Drummond, supra, and in appropriate cases reversals have been ordered. See United States v. Drummond, supra; United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970).

Despite this Court's strongly worded warning that continued prosecutorial misconduct may result in reversal even if the impropriety does not rise to the level of constitutional infringement, United States v. Bivona, supra, 487 F.2d at 447, there are cases where the Assistant United States Attorney flagrantly treads forbidden soil in his blind zeal to secure a conviction. The instant appeal presents a distressing example of exactly this type of impermissible behavior.

B. The Prosecutor Vouched for the Credibility of Government Witnesses

In the course of his final argument the Assistant United States Attorney repeatedly vouched for the credibility of Government witnesses. This result was accomplished by comments which either expressly or by implication were based upon the personal opinion of the prosecutor or facts not in evidence.

At the outset the prosecutor cast the defense in the most negative light and implicitly bolstered the credibility of Charles Johnson, the sole accomplice witness, when he said:

"What does the defense say about Charlie Johnson? Basically, what the defense says is that Charlie Johnson got up on that stand and told you bald faced, outright, unmitigated lies. That, in effect, he was attempting to seduce you into making one of the most unjust verdicts that could possibly be made." (A 194) (emphasis supplied)

The jury was invited to conclude that the prosecutor, who has seen and participated in far more criminal cases than the average

layman on a jury, had concluded, based upon his experience, that Johnson was testifying in support of a "just" verdict, despite the defenses assumed claim to the contrary.

The prosecutor next clothed Johnson in the protective cloak of a "Governmental witness":

"Really what you are called upon to do is to decide whether the witnesses for the Government, Charlie Johnson, for example, has been telling the truth, or whether the defendants have been telling the truth."
(A194-195)

Having thus set the stage, the Assistant continued to personally vouch for Johnson's credibility. In a lengthy discourse, he described the deal Johnson made with the Government (A197-202), telling the jury that Johnson will only get a letter from the United States to the Governor if he testifies truthfully; that the witness knew he would be subjected to cross-examination the purpose of which is to "prove he is a liar" (A199-200); that the witness knew that on cross-examination the defense attorney could prove that he is a liar; that Johnson knew that the defense attorney could call witnesses to prove that he was a liar and that he was not with the defendants when he claimed he was (A200); and that the Government will not write a letter on his behalf unless he has told the truth one hundred percent (A201). Implied throughout this commentary is the conclusion that Johnson has told the truth; that the Government is satisfied that he has told the truth; and that the defense has the burden to demonstrate on cross-examination and by affirmative

proof that Johnson lied about specific meetings on specific dates. Furthermore, it implies that Johnson knew before he testified about cross-examination and that the defense could rebut by affirmative proof. This might well have conveyed to the jury the idea that these pitfalls had been discussed when the deal was made and were used at that time by the prosecutor as a means of satisfying himself that Johnson was telling the truth. Of course, there was no testimony about Johnson's knowledge of the defense arsenal or techniques in this case either at the time the deal was concluded or for that matter when he testified at trial.

The Assistant United States Attorney apparently could not resist concluding this portion of his argument without directly and expressly vouching for Johnson's credibility:

"The deal that we had with Charlie Johnson is what cracked this case. It enabled us to get to the bottom of it." (A202)

This statement is a personal endorsement and strongly infers the existence of facts outside of the record to support the conclusions drawn. It is a highly prejudicial and improper comment standing alone. However, the prosecutor insisted upon returning to this theme in rebuttal summation:

"Mr. Quagliata seems to take issue with the number of years that have elapsed since the events in question. It's no mystery about that ladies and gentlemen. You heard about it from Charlie Johnson. Charlie Johnson started to cooperate on April 1, 1976. This indictment was returned promptly in June of 1976. The true facts in this case, the inner workings of this conspiracy did not emerge until Charlie Johnson started to cooperate on April 1, 1976.

That's when there was a prosecutable case. That's when we had a strong case. That's when we brought the case against Andrew Dinko and Patricia." (A252) (emphasis supplied).

The prosecutor has thus told the jury that based upon his personal evaluation Johnson's cooperation revealed the "true facts;" "the inner workings of this conspiracy", and resulted in a "strong case," "a prosecutable case" which led to the instant indictment. In fact, it is submitted that the quoted language is so dramatically clear and expressive that it could well serve as a textbook illustration of the impermissible technique of personally vouching for the credibility of witnesses and for the strength and justice of a litigant's cause.

Even in arguing that Johnson should be believed because he was not intelligent enough to keep a complicated series of events straight in his mind, the prosecutor could not avoid interjecting his personal belief:

"I further suggest, ladies and gentlemen, that Charlie Johnson, even if he wanted to, could not keep a complicated series of facts such as he testified to, straight, if he wanted to lie. I don't think he was capable of it." (A208) (emphasis supplied).

Finally, the Assistant United States Attorney was unable to complete his defense of Johnson without a misrepresentation of the record, followed immediately thereafter by a foul and unfounded insinuation (A202-204). In this portion of the argument, the prosecutor was commenting upon whether the defense had proven a motive attributable to Johnson to implicate the defendants in this crime.

He stated:

"I suggest, ladies and gentlemen, you can scour that record, and there is not this much evidence, not a scintilla of evidence, as to what motive Charlie Johnson would (sic) have for implicating innocent people as opposed to the real people that he dealt with." (A202-203).

Apart from the fact that the defense had no burden to discredit Johnson, the record discloses that a motive did exist. There was testimony that when the defendants learned that Johnson was using drugs they asked him to move out of their house and that the defendants prevented Johnson and his friends from attempting to steal \$40,000. In supplying an example of what proof the defense should have shown to discredit Johnson, the Assistant cast Mrs. Dinko in the role of an adultress and a thief:

"If the defense, for example, ladies and gentlemen, were able to show that there was some kind of an affair between Charlie Johnson and Patricia Dinko, or anything of that sort, then I would say to you that might be a motive, that might be a reason for your hesitating in terms of Charlie Johnson's testimony. Maybe he was jilted. Maybe Mr. and Mrs. Dinko stole money from him, or something like that. But there has been nothing of the sort shown. That might establish motive. There has been nothing shown. Nothing whatsoever." (A203-204).

This portion of the argument concludes with the following language:

"MR. APPLEBY: Ladies and gentlemen, Charlie Johnson was not involved in the narcotics business by himself. He was involved with other people, obviously. You can't deal in heroin by yourself. So why is Charlie Johnson going to get on the stand and implicate innocent people as opposed to the real people that he was dealing in heroin with?

You know, I can understand your hesitation if, for example, Charles Johnson said, 'Look, I had nothing to do with heroin'--

MR. QUAGLIATA: Your Honor, I think possibly we might make it clear that what Mr. Appleby understands and what Mr. Appleby thinks is not part of the record.

THE COURT: They know that; they know the argument of attorneys is not part of the case.

MR. APPLEBY: I could understand if he got on the stand and said, 'I'm not involved in heroin, but I will tell you who is involved: Andy and Patricia Dinko.' Then I can understand your saying that is a little suspicious. That's not what he said.

Charlie Johnson said, 'I'm involved in the narcotics traffic, and I'm going to tell you who else I was involved with.' (A204) (emphasis supplied).

In spite of the cautionary language by the Court, the continued use of the phrase "I can understand" in place of "I submit" or some other proper prefix clearly implied the negative in the context in which it was used. Thus, the jury was left with the following impressions: The Assistant United States Attorney could understand our hesitating in terms of Johnson's credibility had he denied any personal involvement in narcotics trafficking. However, Johnson has admitted his participation. Therefore, the Assistant United States Attorney cannot understand our hesitating in believing Johnson's testimony. Thus, the prosecutor has again managed to personally vouch for Johnson's credibility.

It is submitted that the improper remarks to bolster Johnson's credibility are sufficiently prejudicial to require a new trial.

However, the Assistant United States Attorney did not stop there. Improprieties continued in his effort to credit the testimony of Henry Segar, the former D.E.A. agent.

Once again the Assistant United States Attorney began his discussion with a grossly exaggerated and inflammatory characterization of the defense position. The language he selected improperly cast an onerous burden on the defense and simultaneously conveyed implications far beyond the evidence presented:

"What's the defense position here? That Henry Segar couldn't tell the truth about any fact whatsoever; that everything -- two hundred -- all two hundred cases of his are total lies; that he couldn't tell the truth no matter what.

Is Henry Segar paid by the head? Does he get an extra thousand dollars for convicting an Andrew and Patricia Dinko, just like Patricia Dinko and Andrew Dinko got extra money for selling an eighth of a kilogram of heroin." (A222-223).

The clear implication of this argument is that the defense, having assumed this position, must prove that Segar "couldn't tell the truth about any fact whatsoever," and that "all two hundred cases of his are total lies" before they are entitled to argue that his testimony should not be credited. Considering that the prosecutor told the jury that it should believe Segar, there is an implication that facts outside of the record, supplied by his two hundred cases, support his credibility.

Next, in discussing Segar's dismissal from the D.E.A., the Assistant supports his credibility by inferring that his reports,

which were never introduced into evidence, support his version of the facts and were made more or less contemporaneously therewith:

"Thirdly, Henry Segar was cross-examined with respect to the reports that he filed after he conducted the meetings that he had in this case. Those reports were written either the same day or the day after the events occurred. He prepared those notes prior to the incident which led to this -- which led to his dismissal. So there was no opportunity or no reason for Henry Segar to make up the report about the Dinkos, about his investigation, about his meeting with Patricia Dinko based on the facts of his dismissal." (A224).

The prosecutor was obviously using the witness' reports as if they had been introduced into evidence as prior consistent statements to rebut a charge of recent fabrication. Considering that the witness had frequently referred to his notes during direct examination to refresh his recollection (T223, 244-45, 250-51) and that the reports were never introduced into evidence, the prosecutor became an unsworn witness as to the corroborative nature of the reports. The jury was asked to believe Segar based on facts not in evidence, and to speculate about the contents of the reports.

Then follows a somewhat confusing dissertation on the facts of Segar's dismissal from the D.E.A. (A225-226) which culminated in the following:

"All I am trying to say, ladies and gentlemen, is that now when Henry Segar is no longer with the Government, when it means nothing to him, Andrew and Patricia Dinko mean nothing to him, he identified Patricia Dinko. When his job depended on it, he refused -- excuse me -- he could not identify a person in Court and said that he couldn't identify that person in Court. He had every motivation to keep his job then and to lie and to say that he could identify that defendant in Court." (A227).

Once again, the Assistant United States Attorney has gone beyond the record to bolster his witness' credibility. He told the jury when Segar failed to make the in-court identification which led to his dismissal, he knew that his job was in jeopardy and therefore had "every motivation to ... to lie and to say that he could identify that defendant in Court". That last phrase implies much more. It implies that Segar was wrongfully dismissed, that he told the truth and was punished as a result thereof, and that facts, beyond the record, within the special knowledge of the Assistant United States Attorney have led him to conclude that Segar would have lied had he identified that defendant during that trial.

Finally, even when the prosecutor discussed the credibility of two of the Government's minor witnesses, he could not refrain from inflammatory rhetoric which was based upon facts not in evidence (See A218-219).

C. The Prosecutor Improperly Commented Upon the
Credibility of Patricia Dinko

The Assistant United States Attorney not only resorted to personal belief and facts beyond the record to bolster the credibility of Government witnesses, but also to attack the credibility of Patricia Dinko.*

*We have already reviewed improper and highly prejudicial implication that Mrs. Dinko could have been portrayed as an adulteress and a thief. (Brief at P. 41).

The Assistant overstepped the bounds of propriety in referring to the defendant, Patricia Dinko's testimony that she had deposited \$20,000 in twelve banks during the last quarter of 1971:

"Item: Patricia Dinko says that she keeps all her money in twelve different banks and in four different states. Why does she say that? She says, because I don't trust the banks. They are not solvent.

Didn't Mrs. Dinko hear of the FDIC? Did she think the Federal Government is going to fall down also?" (A231).

Of course, the Assistant United States Attorney had never asked Mrs. Dinko if she had heard of the Federal Deposit Insurance Corporation and if she understood its significance.

The prosecutor continued:

"I suggest, ladies and gentlemen, that Patricia Dinko acted with respect to those bank accounts just like an ordinary narcotics trafficker trying to hide the proceeds of her narcotics sales. She didn't know that the bank -- that the Government knew about all those twelve banks, just like she didn't know she was dealing with Henry Segar on November 27th.

One thing is clear, ladies and gentlemen, Patricia Dinko didn't put that money in those different banks because she felt those banks were going to fold. She -- the reason, ladies and gentlemen, is obvious. Because she didn't want the narcotics officers to find out where she was stashing the money that was the proceeds of her narcotics sales." (A231-232) (emphasis supplied).

The Assistant returns to this topic one last time:

"There is no doubt about the fact that Patricia Dinko and Andrew Dinko were engaged in the trafficking of heroin for profit. So that Patricia Dinko could put oodles of more money in 20 more banks in ten more states." (A240).

By reference to what an "ordinary narcotics trafficker" does, the Assistant United States Attorney became an unsworn expert witness. The jury could reasonably have concluded that this statement rested not on the evidence, but rather upon the prosecutor's experience with numerous narcotics investigations. In addition, he implies that Mrs. Dinko attempted to hide the existence of these funds when questioned by the Government. The record clearly reveals that Mrs. Dinko, on cross-examination, volunteered the fact that she had brought \$20,000 into the United States in 1971. (A171, 175-176).

In fact, there is a serious question about the propriety of drawing the inference that these funds represented narcotics proceeds. Unlike other narcotics cases, the amount of cash involved was relatively small, was not readily accessible and was in accounts requiring that deposits and withdrawals be documented. See, e.g., United States v. Magnano, 543 F.2d 431, 437 (2d Cir. 1976), cert. denied, ___ U.S. ___, ___ L.Ed.2d ___, 97 S. Ct. 1100-1101 (1977) (\$500,000 in cash seized with narcotics paraphernalia in defendant's home); United States v. Schwartz, 535 F.2d 160 (2d Cir. 1976), cert. denied, ___ U.S. ___, ___ L.Ed.2d ___, 97 S. Ct. 1175, reh. denied, ___ U.S. ___, ___ L.Ed.2d ___, 97 S. Ct. 1669 (1977), (\$75,000 in cash, deed to property worth \$210,000 and money wrappers found in defendant's safe deposit box); United States v. Tramunti, 513 F.2d 1087 (2d Cir.) cert. denied, 423 U.S. 832, 46 L.Ed.2d 50 (1975) (\$960,000 in suitcase being transported in middle of the night).

Furthermore although the Government witness testified to a conspiracy which continued and expanded in scope from 1971 through 1973, the deposits in question were limited to the last quarter of 1971. These facts point more logically to the defendant's explanation that the money was left to her by an uncle who passed away. Certainly before the Government was permitted to attribute these funds to an illegal source, it should at least have made an effort to check the defendant's explanation. See United States v. Falley, 489 F.2d 33, 38-39 (2d Cir. 1973).

Not only did the prosecutor label these funds as narcotics proceeds, he speculated that the defendants would "put oodles of more money in 20 more banks in ten more states."

The most egregious error in this part of the argument occurred when the Assistant United States Attorney ventured to comment upon the defendants' tax returns:

"Patricia Dinko says that she never discussed her finances with her husband, never discussed income taxes with her husband, never discussed it from '68, '69 through 1976. Don't you think that when April 15th came around it would have been logical for Patricia Dinko, who is sophisticated enough to put large sums of money in different banks, don't you think they might have a discussion about the inadvisability of filing a joint tax return? No. She didn't talk to her husband at all, she says. And I suggest the reason, ladies and gentlemen, is not because she didn't know about the wisdom of filing a joint tax return, because she didn't even get that far. Because they had no -- absolutely no intention of ever filing a tax return.

Mr. Quagliata: Judge --

MR. APPLEBY: Because you have to report -- you can't report narcotics proceeds in a tax return.

THE COURT: Hold it.

MR. QUAGLIATA: Judge, I think we should get to the issues in the case, most respectfully.

THE COURT: No. He may argue. He's drawing an inference." (A232-233) (emphasis supplied).

During cross-examination the Court had permitted inquiry about whether either defendant had filed income tax returns for the years 1969 through 1976 apparently pursuant to Rule 608(b), Federal Rules of Evidence. Mrs. Dinko testified that she had filed returns, but because the Internal Revenue Service said otherwise, she was refileing. She also testified that she had no knowledge of whether her husband filed returns because they do not file jointly (A188). Then, only the day before summations, the Court ruled that the Government could not offer extrinsic proof on this issue because it was collateral.

With this background, the Assistant United States Attorney told the jury that he knows from facts outside of the record, that neither Mr. nor Mrs. Dinko filed tax returns for the years 1968 through and including 1976. He did not stop there. He also told the jury that this was a deliberate tactic to avoid detection because "you can't report narcotics proceeds in a tax return."

Even if this were not a collateral matter, and even if the Assistant had based his argument on facts in the record, this last statement would be improper and highly prejudicial. It amounts to a legal opinion emanating from the Attorney for the United States of

America. The average layman serving on a jury will accept this type of argument -- a statement of the law from the Government's lawyer -- as gospel.

In addition to all of the other objectional aspects of this argument, it happens to be legally unfounded. A person engaged in a criminal enterprise may file a tax return reporting the proceeds but asserting the Fifth Amendment to avoid disclosing the source. See Garner v. United States, 424 U.S. 648, 47 L.Ed.2d 370 (1976).

D. The Prosecutor Made Other Improper Comments During Final Argument

Throughout the summation the Assistant United States Attorney attempted to shift the burden of proof to the defense. By implication, it became the defenses' burden to prove that Johnson told "bald faced, outright, unmitigated lies" (A194) through cross-examination and by calling witnesses (A200, 206); that Segar "couldn't tell [the jury] the truth if his life depended on it" (A219); that Segar "became a Dr. Jekyll and Mr. Hyde" (A222); that "all two hundred cases of his are total lies" (A222); and that he was "in cahoots with the National Maritime Union" (A238).

E. The Prejudicial Effect of the Improper Comments

In order to assess the impact these comments had on the jury's verdict, we must consider the relative strengths or weaknesses of

the evidence presented and the relationship of the closing argument to central issues. Compare United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239, 84 L.Ed. 1129 (1940), and Berger v. United States, 295 U.S. 78, 88-89, 79 L.Ed. 1314 (1935).

Because a plausible defense was presented and because this case turned on an issue of credibility, there can be no question that the prosecutor's improper closing argument designed to bolster the credibility of Government witnesses, to undermine the credibility and character of Patricia Dinko and to shift the burden of proof, seriously affected the jury's verdict and deprived the defendants of a fair trial.

Even if this Court should conclude that sufficient prejudice did not result, the judgment should be reversed to deter future prosecutorial misconduct. This drastic action is warranted because of the repeated admonitions of this Court which have apparently gone unheeded. United States v. Burse, supra, 531 F.2d at 1154; United States v. Bivona, supra; United States v. White, supra; United States v. Drummond, supra.

CONCLUSION

For the reasons stated herein, the judgment of conviction of each defendant should be reversed and the case remanded for a new trial.

Respectfully submitted,

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Service of 2 copies of the
within Brief is hereby
admitted this 30th day of
Nov. 1977

Signed _____

Attorney for Appellee

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